IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 154.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

ALEX. BRITTON,
EVANS BROWNE,
Counsel for Appellant.

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Assignment of Errors.

(1) The Court of Claims erred in dismissing the petition.

(2) The Court of Claims erred in not rendering judgment for claimant.

(3) Upon the facts found, the Court erred as a matter of law in dismissing the Petition.

Statement of Case.

We have assigned the errors of the Court of Claims first, because to state the case clearly is to argue it.

The petition in this case was dismissed by the Court of Claims upon the authority of its opinion in case No. 31,610, Louisville and Nashville Railroad Company, and the opinion in that case is to be taken as filed in this case. The two cases were tried at the same time, but to save the time of this court only one of them has been brought before it on appeal.

The findings of fact show contracts between the Kansas City Southern Railway Company and the United States under which the company agreed to carry the mails of the United States over Mail Route 149027, between De Quincy and Lake Charles, Louisiana; Route 153011, between Siloam Springs, Arkansas, and Port Arthur, Texas, and Route 155054, between Kansas City and Siloam Springs, during the four years ending June 30, 1910,

> "Upon the conditions prescribed by law, and the "regulations of the Department applicable to railroad "mail service."

In fixing the amount to be paid the company for such service, the Postmaster General made three orders during September, 1906, which (with differences in rates and destinations) provided:

> "From July 1, 1906, to June 30, 1910, pay the "Kansas City Southern Railway Company, quarterly, "for the transportation of mails between De Quincy "and Lake Charles, Louisiana, at the rate of $1,677.21 "per annum, being $73.33 for 22.81 miles. This "adjustment is subject to future orders and to fines "and deductions, *and is based on a service of not less "than six round trips per week.*"

Notwithstanding the company carried over its several mail routes all mail matter tendered it and performed not less than six round trips per week, the Postmaster General, arbitrarily and without authority of law, deducted from the company's pay $3,355.48, solely because certain trains of the company did not arrive at their destinations on the time fixed by the company's published schedule of departure and arrival of its trains.

This suit was brought to recover such deductions upon the ground that at no time during the performance of its contract was it under any obligation to make schedule time, and hence the Postmaster General had no authority to withhold moneys earned.

The Court of Claims finding the facts as above stated, held the Postmaster General had discretionary power under section 3962, Revised Statutes, to make such deductions.

Section 3962 R. S. provides:

> "The Postmaster General may make deductions "from the pay of contractors for failure to perform "service *according to contract* and impose fines upon "them for other delinquencies. He may deduct the "price of the trip in all cases where the trip is not "performed and not exceeding three times the price "if failure be occasioned by the fault of the Con- "tractor."

It will sufficiently appear from the above that this company contracted to carry the mail between certain points not less often than six times per week and upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service.

The conditions prescribed by law were:

1st. That the mails shall be conveyed with due frequency and speed, and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and

warmed, shall be provided for (railway postal clerks) to accompany and distribute the mail.

2nd. That the pay per mile per annum should be at certain rates, based upon the weight of mail carried; the average weight to be ascertained by weighings as prescribed by law.

See section 4002, Revised Statutes, as amended by the acts of July 12, 1876, and June 17, 1878 (19 Stat. L., 79, and 20 Stat. L., 142.)

There were no conditions prescribed by the regulations of the Post Office Department imposing any other or different conditions material to this case, beyond the reserved right of the Department to decide upon what trains and in what manner the mails should be conveyed.

Section 1181, Postal Regulations 1902.

In the exercise of the discretion vested in him, as limited by law, the Postmaster General caused the mail to be weighed over routes 149027, 153011, and 155054, and fixed the annual compensation to be paid claimant for four years from June 30, 1906, "based upon a service of not less than six round trips per week."

There is no question, so far as this case is concerned, that the claimant performed a service of not less than six round trips per week and carried mail upon all trains designated by the Postmaster General. The amount now sued for is for deductions made from the claimant's pay because some of its mail-carrying trains did not reach their destination on schedule time.

ARGUMENT.

It is a well-settled and understood proposition of law that—

> "The announcement of schedules for the arrival "and departure of trains does not give rise to a con- "tract that as to a particular train the schedule will "be complied with, the liability for not complying

> "being one based on negligence in the proper opera-
> "tion of the train in connection with the business of
> "the carrier."
>
> 6 Cyc., p. 587.

No carrier ever has contracted, or ever will contract, to run its trains on schedule time, and it is both unreasonable and unlawful to read into the contract here in question any such condition. The claimant did undertake to carry the mail over its various routes not less frequently than six round trips per week, and the United States agreed, in consideration of such service, to pay the company a certain sum of money. The company performed the service, but instead of paying the amount agreed upon and fixed by law the Postmaster General deducted the amount here sued for solely because the company did not run its trains on schedule time, a condition not covered by the contract.

So far as appears from the findings, for the 33 years following the act of March 3, 1873, conditioning the right of the railroads to payment at the rates therein provided upon their conveying the mails with due frequency and speed, no attempt had been made by the Postmaster General, by regulation or otherwise, to make deductions for mere late arrivals of trains.

In the Post Office appropriation act for the fiscal year ending June 30, 1907, approved June 26, 1906 (34 Stats. L., Ch. 3546, pp. 467, 472–3), the following was enacted:

> "That the Postmaster General shall require all
> "railroads carrying the mails under contract *to com-*
> *"ply with the terms of said contract as to time of*
> *"arrival and departure of said mails,* and it shall be
> "his duty to impose and collect reasonable fines for
> "delay when such delay is not caused by unavoidable
> "accidents or conditions." (Italics ours.)

Previous to this act, the law governing the Postmaster General's action in cases of failures and delinquencies was

found in section 3962, Revised Statutes, carried as section 1332 of the Postal Laws and Regulations, edition of 1902, and set out in finding III, as follows:

> "The Postmaster General may make deductions "from the pay of contractors for failures to perform "service *according to contract,* and impose fines upon "them for other delinquencies. He may deduct the "price of the trip in all cases where the trip is not "performed; and not exceeding three times the price "if the failure be occasioned by the fault of the con- "tractor." (Italics ours.)

It is plain enough that under the provision in the act of 1906 by its own terms, a condition precedent to the imposition and collection of fines is that the company should be under contract to maintain its schedules, and that where there was no such contract there was nothing for the statute to operate upon.

So far as section 3962, Revised Statutes, is concerned, we see also that the pay was not subject to diminution except for two reasons and in two ways—deductions for failure to perform service according to contract, and fines for delinquencies—so it is evident also from this statute that unless the company was under contract to operate its trains on their schedule time, it was not subject to deductions for failure to do so, nor was it subject to fine as for delinquency, for the reason that no one can be delinquent for failing to do what he is under no obligation to do.

The foregoing recites all the statute law in connection with the subject. It goes to show that Congress realized the railroads would know it was to their interest to operate their trains on time, and were no more liable to the Government than to private individuals for their failure to do so. There is scarcely a living person who can remember a railroad timetable which did not plainly specify that the operation of trains in accordance therewith could not be guaranteed.

Obviously, the administrative regulations framed by the Postmaster General must be within the law, and it will be interesting to analyze these regulations for the purpose of seeing if the failure to make train schedule time was ever considered within the purview of the statutes providing for deductions or fines. If not, there is no usage, custom, or long-continued departmental construction for appellant to combat. On the contrary, the failure of the regulations to provide for deductions in such cases would reinforce our contentions.

We respectfully submit that, while the Postmaster General did, in October, 1905 (Tr., p. 6), issue an order proposing to make deductions for late arrivals on routes only where the service was not more frequent than seven times a week each way, it can have no effect in this case, for the reason that even limited as it was, it would not have been in operation long enough to give it a standing, either by acquiescence or otherwise, as a departmental construction of the law, which on its face it did not even purport to be, and for the further reasons, first, that it was illegal, and, second, that the departmental regulations, which are set out in Finding III, specifically protect the railroads against any such deductions.

II.

We might rest the case with the admission in the opinion that, other than the order of October, 1905, there was no regulation bearing on the subject, but we propose to show that not only do these regulations fail to provide for such deductions, but also that they specifically provide otherwise.

Section 1330, Postal Laws and Regulations, edition of 1902, provides for affidavits from railroad companies for *failures* of trains carrying the mails, and indicates that the Department was not interested in delays to ordinary trains, but only, and occasionally at that, in delays to tra ns re-

garded as being of special importance as mail trains—that is, trains under contract to make their schedules and generally subsidized by Congress, as shown by the testimony of Mr. Stewart, Second Assistant Postmaster General, *intra.* Next, by section 1334, paragraph 1, it is provided that deductions are to be made according to the nature and frequency of the *failure* and the importance of the mail. Now, what was "failure"? It is defined by paragraph 4 of this regulation 1334, where it is said:

> "A train will be considered as failing to perform "service when it becomes 24 hours or more late, and "will be charged with failure from the point where it "becomes 24 hours late to the end of this run, *or to "the point at which* it becomes less than 24 hours "late." (Italics ours.)

In other words, no deduction would be made except for a failure of service, and there would be no failure if the train was operated at all that day. If there was any doubt about this, paragraph 5 of the same regulation resolves it in favor of our contention, ~~but~~ providing that if another train should be made up and cover the failing train's run within the 24-hour limit, such service would be credited in lieu of the train which had broken down. Paragraph 12 further elucidates the differences in failure to perform "according to contract" by providing for deductions for failure to arrive at the time fixed by their schedules of trains regarded as special importance, with respect to which the opinion of the Court of Claims, saying, "It is true the regulations limited the deductions to specified routes,"—meaning specified trains—expressed its appreciation of both the difference and the limitation.

All these regulations clearly show the meaning of section 1186, Postal Laws and Regulations of 1902, paragraph 3, under which it has never been thought that the Postmaster General could dictate to a railroad the speed at which it should

operate its trains, or reduce its pay for its failure to live up to its own expectations in that respect. The requirements of frequency and speed were met if the railroad company provided the Department as good service as it provided its other patrons, it being understood that this should consist of a service of not less than six round trips a week. This suit does not claim anything whatsoever that may have been deducted from appellant's pay for any failure that may have occurred to render that service.

That this rendition of a service of not less than six round trips a week was and is the limit of the absolute obligation of the railroads is recognized by the Court of Claims itself in the case of the Texas & Pacific Railway Company *vs.* The United States, No. 31,550, decided March 25, 1918, on findings of fact without an opinion. The question there was whether the Postmaster General had right to make deductions from the transportation pay of the claimant for absolute failure of trains due to flood conditions, the company nevertheless maintaining a service of not less than six round trips a week. The court found the facts to be that the annulment of the failing trains did not reduce the service below six round trips per week and gave judgment for the claimant for the deductions made from its pay. In other words, the court in that case said in effect that the Postmaster General was not authorized to make deductions under the law and the contract for absolute failures of trains, provided a service of not less than six round trips per week was maintained, while in this case it says the Postmaster General was authorized by the same statutes and the same contract to make deductions for mere lateness of trains, even if a service of many times six round trips a week was maintained.

In its opinion, the court says, "it is true that except for the year 1879-1880, the Postmaster General has not made deductions from the railroad's compensation for transporting the mails for mere failure to maintain schedules." The inference is that the Postmaster General did, at said time,

make such deductions on the authority of section 3962, but it will be noticed that there is no finding of fact to that effect. If the Postmaster General did, in 1879-1880, make such deductions, it was in the enforcement of an entirely independent statute, since repealed, viz., the act approved March 3, 1879 (ch. 259, 1 Supp. Rev. Stat., 453), section 5 of which was as follows:

> "That the Postmaster General shall deduct from "the pay of railroad companies, *for every failure to "deliver a mail* within its schedule time, not less than "one-half of the price of the trip, and where the trip "is not performed, not less than the price of one trip, "and not exceeding, in either case, the price of three "trips." (Italics ours.)

This law was expressly repealed by the act of June 11, 1880 (chap. 206, I Supp. Rev. Stat., 549), leaving the law as it was before, and as it has remained ever since.

The short-lived act of 1879 introduced an entirely new ground for making deductions, viz: the failure to deliver a mail within its schedule time. Its repeal carried that direction with it, and sustains our theory that there was not before, and has not been since, any law for deductions of the kind complained of in this suit.

That we are clearly right, so far as the testimony of a witness can demonstrate us to be, is shown by the testimony of Mr. Joseph Stewart, Second Assistant Postmaster General, *under oath,* before the Joint Committee of Congress on Compensation for the Transportation of Mail, on January 28, 1913, when the following occurred:

> "SENATOR BANKHEAD: What amount of penalty "does the Postoffice Department receive annually "from what is known as a failure to deliver the mail "on schedule time? Haven't you a penalty attached "for that failure?
>
> "MR. STEWART: No, sir; not at this time.
>
> "SENATOR BANKHEAD: You used to have?

"MR. STEWART: We used to have, by special di-
"rection of Congress, and that was carried, I think,
"for two years, and we assessed fines against the rail-
"road company for failure to keep their schedule
"time.

"SENATOR BANKHEAD: I know that was in prac-
"tice at one time not very long ago.

"MR. STEWART: Yes, but that was discontinued for
"this reason—that all the fines we would assess for
"this purpose did not accomplish anything in the
"way of improving their schedules. It simply caused
"irritation, and took the money of the road instead
"of allowing it to go toward improved service.

"SENATOR BANKHEAD: I supposed the same rule
"was in vogue now.

"MR. STEWART: No, upon our representation to
"Congress of those facts Congress dropped that out of
"the appropriation bill.

"SENATOR BANKHEAD: You spoke awhile ago of
"subsidizing trains from New York to New Orleans.
"You finally decided you did not want them any
"more, because it was an additional expense to them,
"and the additional pay they received would not
"justify them in the schedules they were required to
"make, and in the end all the additional pay they
"received was taken in fines, because they failed to
"make a schedule, and I think the Post Office Depart-
"ment made the schedules for them and said when
"they should leave and when they should arrive at a
"certain destination?

"MR. STEWART: Yes, in order to make connections
"we would have to do that. In the case of a train
"like that, if they did not make their schedule we
"would fine them.

"SENATOR BANKHEAD: Yes. That is what I had
"in mind."

(Vol. I of Hearings, pp. 19-20.)

Moreover, when the appropriation act for the following year—the act of March 2, 1907—was in the making, the contemporaneous Second Assistant Postmaster General, Mr. Shallenberger, Mr. Stewart's predecessor, made it clear to

the House Committee on Post Offices and Post Roads that the act of June 26, 1906, was something *entirely new*, when he said:

> "The law of the last session of Congress will have "the effect of reducing the railway mail pay unless "the railroad companies shall do what they have not "been doing of late in the direction of satisfactory "service. As you know, substantially all the railroads "have been burdened with an unprecedented traffic. "Complaints come from every section of the rountry "that schedules are not maintained. Congress has "taken note of that and last year adopted an amend- "ment to the bill which authorized and directed the "Postmaster General to impose fines and makes de- "ductions from the pay of railroad companies for "failure to observe schedules."
>
> ("Post Office Appropriation Bill, 1908—Hearings before Sub-committee No. 1 of the Committee on Post Offices and Post Roads, House of Representatives," pp. 145-'6.)

Of course, we do not contend that Mr. Stewart's sworn testimony and Mr. Shallenberger's confession settle the law. If we did, we would rest our case upon them. The Court of Claims holds that the act of June 26, 1906, added nothing to the existing law except that it made the application of the provisions of section 3962 mandatory on the Postmaster General. We agree with this. The Post Office Department experts swear that without the act of June 26, 1906, there was *no* penalty attached for the failure to maintain schedules. We also agree with this, but we point out that these acts, taken either separately or collectively do not authorize these deductions.

Paraphrasing an expression found in the Court of Claims opinion in the Jacksonville, Pensacola & Mobile case, 21 Ct. Cls., 155, 174, the court below says: "The Postmaster General was authorized to do under section 3962 what he was obliged to do under the act of June 26, 1906," and cites that

case and the cases of the Chicago, Milwaukee & St. Paul Ry. Co., 127 U. S., 406, and Minneapolis & St. Louis Ry. Co., 24 Ct. Cls., 350, as to the same effect as authority.

All these decisions are to the same effect, but that effect is not what the Court of Claims ascribes to them in the present case. A merely casual examination of the findings and opinions in the cases referred to shows conclusively that what the court was dealing with in those cases was the right of the Postmaster General to make deductions for absolute failures to operate trains and to deliver the mails on the days—that is, within 24 hours of the time scheduled. That is not the question we are litigating here. The cases are not, therefore, an authority in this case for deductions made for mere late arrivals within the day.

Finally, it may be pointed out from the instructions issued by the Postmaster General after [redacted] the act of 1906, he recognized the difference between "failures" and mere "late arrivals." (Finding IV, Trans., p. 9.)

These adjudications all, like the postal regulations, relate to the matter covered by section 3962 of the Revised Statutes, viz., the entire failure of mail trains to perform the services. It is true, that words were used somewhat loosely in the decisions of the Court of Claims, but nevertheless it is manifest in each of the cases that the subject of the fines complained of was omission to run the train and carry the mail on a day to which the railroad company was bound by its contract.

In Jacksonville, Pensacola & Mobile Railroad Co. *vs.* United States, 21 Ct. Cls., 155, the opinion says (p. 172) that the branch of the controversy referred to related to "non-delivery of mails on several occasions *upon the days* required by schedule time, although they were subsequently delivered" (italics ours), and on the same page, section 3962 is cited as the Department's warrant for the fines in question. The phrase, "upon days required by schedule time" was copied from the findings of fact (p. 164).

This decision shows quite conclusively that there had been no custom of making deductions for mere failure of a train, when making its usual trip, to reach all stations at the times fixed by the schedule. The Post Office appropriations act of March 3, 1879, contained a provision for fines in cases of train lateness, but that had been repealed by the act of June 11, 1880 (1st Supp. Rev. Stat., 549). The Court of Claims held that this legislation, having a different subject, in nowise affected section 3962 (pp. 172–173).

Chicago, Milwaukee & St. Paul Railway Co. *vs.* United States (No. 14438 in the Court of Claims) is not reported except by a syllabus and a copy of the syllabus of this court (127 U. S., 406). What this court had decided, as its head notes show, was that the act of June 11, 1880, had not repealed section 3962—this, and nothing more. This court, however, did say: ....

> "Section 3962 authorizes a deduction from the pay "of contractors, whether they be natural persons or "corporations, the price of the trip in all cases where "the trip is not performed, and not exceeding three "times the price if the failure be caused by the fault "of the contractor or carrier. Section 5 of the act of "1879 applies only to railroad companies, and has "special reference to failures of delivery within sched- "ule time, *and makes a difference between them and "failures to make the trips,* leaving the provision for "the latter substantially as it is in the Revised Stat- "utes." * * *
>
> "The most that can be said of section 5 of the act "of 1879, construed with reference to section 3962 of "the Revised Statutes, is that it makes an exception "to the provisions of that section, so far as railway "companies are concerned. Its repeal, therefore, "leaves the original section in full force."

This would seem to make it clear without examination of the record that the subject of the suit was fines imposed for

"failures to perform services," *i. e.*, the subject of section 3962, but naturally the record contains more of detail.

The case was heard upon demurrer to an amended petition. Following is the text of the paragraph in the petition which describes the omissions of service:

> "Your petitioner alleges that, between the autumn "of the year 1880 and the spring of the year 1883, "owing to snow blockades and floods, and other un- "avoidable causes, all of which it was impossible for "your petitioner to provide against, it was prevented "at various times running its trains of cars over the "said routes, and in consequence thereof the United "States mails were delayed and accumulated until "such times as your petitioner could run its cars over "the routes aforesaid."

To summarize, these decisions show:

(1) That for one year, 1879–1880, there was a law to impose fines for a mere failure of a train on any day to observe its schedule.

(2) That such law and the failures therein provided for were distinct from and in addition to the matter for which section 3962 provided.

(3) That the act of June 26, 1906 (34 Stat., 467), only applied to trains under contract to observe schedule time, and has no application to this case.

(4) That the act of March 2, 1907 (34 Stat., 1212), referred to in the petition, specifically required all contractors to maintain their regular train schedules as to time of arrival and departure; but the deductions involved in this case were made prior to the taking effect of this act and are not affected thereby.

The case in its final analysis comes to this:

There was no failure of service, the company performing service over each of its mail routes more than six round

trips per week and carrying from initial points to terminals all mail delivered to it by the United States within a few minutes or hours of the scheduled time. The company did not specifically contract, and no law or regulation required it, to carry the mail on schedule time.

The position of the Government under the laws and regulations is that a train which breaks down and has its mail carried through by another train any time within the 24-hour limit earns full compensation under the contract, whereas in this case it says that another train performing its own service and arriving at its destination thirty minutes late with the mail does not.

To merely state the proposition seems a sufficient answer.

We respectfully submit the judgment of the Court of Claims should be reversed, with instructions to enter judgment for the company in the sum of $3,355.48.

Respectfully submitted,

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Counsel for Appellant.

BRIEF FOR THE UNITED STATES

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AUTHORITIES CITED.

THE STATUTES AND REGULATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

KANSAS CITY SOUTHERN RAILWAY Company, appellant, *v.* THE UNITED STATES. | No. 154.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This suit presents another one of the many questions which have arisen as to the amount of compensation to which a railroad company was entitled for carrying the mails under the law in force until the coming into effect of the act of July 28, 1916 (39 Stat. 412, 419). It was brought to recover from the United States the amount of fines claimed by appellant to have been illegally imposed upon it by the Postmaster General during the fiscal year ending June 30, 1907, because of its failure to run its trains over certain of its mail routes on schedule

time. The Court of Claims dismissed the petition on the authority of its decision in the case of *Louisville & Nashville Railroad Company* v. *United States*, 53 Ct. Cl. 238 (R. 17–22), and the railroad company appeals.

THE FACTS.

The four-year contracts under which the appellant had theretofore transported the United States mails over the routes here involved were about to expire on June 30, 1906. (R. 4.) On February 13 of that year the Postmaster General sent appellant the customary distance circulars for the routes in question calling for certain information upon the basis of which new four-year contracts might be entered into, and containing an agreement clause which provided that "the company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service." Appellant executed these agreement clauses and returned the circulars properly filled out to the Postmaster General. In due time the latter caused the mails transported over these routes to be weighed and issued orders of authorization stating the amount of compensation he would pay appellant for carrying the mails over the routes in question. Each order stated that:

> This adjustment is subject to future orders and to fines and deductions and is based on service of not less than six round trips per week. (R. 5.)

Among the Postal Laws and Regulations in force during all of the fiscal year ending June 30, 1907, and for many years prior thereto was Revised Statutes, section 3962, which provides as follows:

> The Postmaster General may make deductions from the pay of contractors for failures to perform service according to contract and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.

Revised Statutes, section 4002, authorized the Postmaster General to readjust the compensation to be paid for the transportation of the mails on railroad routes on the condition, among others, that the mails should be conveyed with "due frequency and speed" and fixed the maximum compensation which the Postmaster General was authorized to pay.

There was also in force during the fiscal year ending June 30, 1907, the following provision of the act of June 26, 1906 (34 Stat. 467, 472):

> That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay when such delay is not caused by unavoidable accidents or conditions. (R. 7.)

For the purpose of making the above act effective the Postmaster General on August 3, 1906, issued Order No. 1131 which, after setting forth the provisions of the above act, provides that:

> Every railroad company operating a route over which mails are carried shall, on the regular affidavit covering failures of mail train service which it is required to submit promptly at the end of each quarter to the respective division superintendents, Railway Mail Service, show, in addition to and separate from such mail train failures, the number of minutes late of each arrival (not time of arrival) of every train carrying mail which has reached the terminus of such route, the terminus of such train's run, or any intermediate point designated by the Postmaster General and of which the company shall have notice, thirty or more minutes late as many as ten times during the quarter, the extent, cause in detail, and place of each delay being given. (R. 7.)

On August 13, 1906, a copy of this order, together with certain additional instructions in regard to it, was sent to the general manager of appellant by one of the division superintendents of the Railway Mail Service. (R. 8.)

Appellant in compliance with these instructions made quarterly returns showing the number of minutes late of each arrival of every mail train and the Postmaster General on the basis of these returns made deductions from the compensation paid appellant quarterly at the rate of 20 per cent of the

value of the delayed trains. (R. 11, 17.) Appellant, although it performed the service on the terms above stated without objection and accepted the compensation tendered it without protest against the deductions made, now seeks in this action to recover the amount thereof.

THE CONTENTIONS OF THE PARTIES.

Appellant does not dispute that if the Postmaster General had authority to impose fines on account of the failure of its mail trains to arrive on schedule time he exercised that power reasonably and properly in this case. It does not attempt to deny that a carrier has the power to enter into a contract binding it to maintain its train schedules. It merely denies that the Postmaster General had power to do so or that such a contract was in fact entered into. Its reasoning is somewhat elusive, but it seems to run something like this: Because a carrier does not ordinarily contract to run its trains on schedule time, "it is both unreasonable and unlawful to read into the contract here in question any such condition." (Appellant's Brief, p. 5.) The Postmaster General had never before attempted to enter into a contract requiring a carrier to maintain the train schedules which it from time to time adopts, and this fact showed the absence of his power to do so. Under Revised Statutes, section 3962, and the act of June 26, 1906, the Postmaster General had power to impose fines and make deductions from its compensation only in case it failed

to carry the mails according to contract. (Appellant's Brief, p. 6.) Since appellant had not contracted to maintain such train schedules, the Postmaster General had no power to make deductions from its pay because of its failure to do.

The Government, while recognizing that a carrier does not ordinarily contract to run its trains on schedule time, contends that the parties to a contract for the carriage of the United States mails have power so to contract if they wish; that they had done so on previous occasions and did so in the case under consideration, and that, therefore, the Postmaster General had the power both under Revised Statutes, Sections 3962 and 4002, and under the act of June 26, 1906, to impose fines for failure to run its mail trains on schedule time.

ARGUMENT.

I.

The Postmaster General Had Power to Enter Into A Contract With Appellant Whereby the Latter Was Bound to Maintain the Train Schedules Published by It From Time to Time.

The Postmaster General has from the very creation of his office been vested with the widest discretion in entering into contracts for the carriage of the mails. Such limitations as Congress has from time to time imposed upon him have been directed solely to the protection of the government from the results of imprudence on his part or extortion on the part of those with whom he must deal.

At the time of the transactions here involved the only limitations imposed upon his discretion were those contained in Revised Statutes, section 4002, and the statutes amendatory thereof, namely, that he should not agree to pay compensation at rates exceeding certain fixed maxima which were graded according to the average weight per day of the mails carried, to be ascertained in a manner authorized by the statute. While Revised Statutes, section 4002, directed the Postmaster General in adjusting the compensation to consider certain conditions, among which was that the mails should be conveyed with due frequency and speed, it left to his discretion the determination of what is "due frequency and speed," as well as the means of enforcing this condition.

The Postmaster General was not obliged to agree in any case to pay the railroads the maximum compensation. Within the maximum fixed by statute he had power to fix the rate of compensation allowed as well as to prescribe the quality of the services to be rendered. The regular carriage of the mails according to a fixed schedule is a more valuable service than an irregular carriage subject to frequent delays and departure from the schedule. The Postmaster General could refuse to enter into a contract whereby any railroad company was to receive the full compensation allowed by him under the statute, unless the company agreed to maintain the train schedules published by it from time to time. The power to do so

was neither expressly nor impliedly withheld. It clearly was within the wide discretionary powers vested in him. He also had the right to declare that he would pay a higher rate of compensation for those routes over which train schedules were maintained with reasonable regularity than those over which they were not so maintained. To make a difference in the rate of compensation paid the railroads based upon regularity of the service would not be an abuse of his discretion. It would be a reasonable method of insuring the transportation of the mails with due frequency and speed.

Appellant erroneously assumes that the Postmaster General's power to make the deductions which he made in this case must be derived from sections 3962 or the act of June 26, 1906. The purpose of section 3962 was to empower the Postmaster General to make deductions for infractions of contract where the contract did not itself expressly stipulate what the consequence of such infractions should be. It need not be resorted to to demonstrate the power of the Postmaster General to provide by contract what shall be the consequence of the failure of a carrier to maintain train schedules which it had agreed to maintain. That power is derived from Revised Statutes, section 4002.

One of the questions decided in *Jacksonville, Pensacola & Mobile Railroad Company* v. *United States,* 21 Ct. Cl. 155, was as to the right of the Postmaster General to make deductions from the compensation fixed by law and the orders of the

department for nondelivery of mail on the days required by schedule time although they were subsequently delivered. The court after deciding that such deductions were authorized by Revised Statutes, section 3962, and that the latter had not been repealed by section 5 of the act of March 3, 1879, said (p. 174):

> But there is another view of this branch of the case, independent of these statutes. * * * The maximum compensation authorized by statute and the amount allowed thereunder by the Postmaster General are for the whole service expected of such railroad companies according to schedule time and other regulations of the department. For any failure on the part of a railroad company to perform the entire service and to carry the mails in accordance with the standing order and regulations of the department, the Postmaster General had the right, and it was his duty, to withhold and deduct from the authorized compensation a reasonable amount as damages for such failure. That was all he did in this case.

Appellant concedes that the power of the Postmaster General to make deductions in case a train is delayed twenty-four hours or more is established beyond dispute, but contends that a different principle applies where a train is less than twenty-four hours late. It says that the delay of a train for twenty-four hours or more was treated under the regulations of the Post Office Department as a failure to perform service according to contract;

that under Revised Statutes, section 3962, the Postmaster General has authority to make deductions only for failure to perform service; that there is no failure to perform service where the railroad company makes six or more round trips per week.

Clearly the last of these assertions is unsound and with it falls the entire argument. The second sentence of section 3962 applies to the case of a total failure to complete at any time a trip which the carrier has contracted to make, but it does not limit the power which the Postmaster General has under Revised Statutes, section 4002, and the first sentence of section 3962 to make deductions for other failures to perform service. It merely limits the amount the Postmaster General may deduct for that particular failure.

Appellant fails to point out any difference in principle between the failure of a train to arrive within one-half hour of schedule time and its failure to arrive within twenty-four hours. The power to make deductions in the latter case is nowhere expressly granted. If the Postmaster General may consider the failure to arrive within twenty-four hours of schedule time as a failure to perform service and enter into a contract with the carrier on that basis, why may he not also consider the failure to arrive within one-half hour of schedule time as a failure to perform service? In either case the power must be derived from Revised Statutes, section 4002, and the powers conferred by that section

are broad enough to sustain deductions where a train is less, as well as where it is more, than twenty-four hours late. The failure of the courts in a number of cases to distinguish clearly between the two shows that they had no such distinction in mind and that it does not in fact exist.

That the distinction appellant seeks to make does not exist is also proven by the fact that the Postmaster General actually did, prior to the act of June 26, 1906, make deductions in special cases for failure to observe train schedules. Postal Laws and Regulations, 1902 edition, provides in section 1330:

> Railroad companies must furnish quarterly, to the division superintendent of Railway Mail Service, statements on the form prescribed by the Post Office Department, and affirmed under oath of their respective principal transportation officers, showing by routes all failures of trains carrying the mail; also, when called upon to do so, railroad companies will be required to furnish monthly statements, certified as above, of all delays, and their causes, to trains which the department regards as being of special importance as mail trains. (R. 5.)

Section 1334, paragraph 12, provides:

> Trains which the department regards as being of special importance as mail trains will be subject to deductions for failure to arrive at junction and terminal points at the time fixed by schedule unless held for mail connections, or unless satisfactory explanation be given in due time. (R. 6.)

And on October 2, 1905, the following order was issued:

> On account of the inferior service resulting from failures to observe the schedule on routes, or parts of routes, on which railroad mail service is not more frequent than seven times a week each way, it is ordered that in certifying to the performance of the service on such routes for, and subsequent to, the quarter ending December 31, 1905, deductions be made at the rate of twenty (20) per cent of the value of each train that arrives at the termini or junction points fifteen (15), or more minutes late and the aggregate number of late arrivals if ten (10) or more, without satisfactory excuse, in any one quarter, except that no deduction of less than one dollar ($1) will be made. (R. 6.)

The requirement of section 1330 that railroad companies must furnish monthly statements of all delays and their causes to trains which were regarded by the department as being of special importance as mail trains, coupled with the provision of section 1334 that such trains would be subject to deductions for failure to arrive at junction and terminal points at the time fixed by schedule unless such failure was satisfactorily explained, was clearly an exercise of the Postmaster General's power to incorporate into the contracts of mail carriage the schedules of the trains to which these regulations applied. The same is true of the order of

October 2, 1905. By promulgating these regulations the Postmaster General notified the railway companies that so far as the trains affected thereby were concerned he would pay the maximum rates for mail carriage according to train schedule and a reduced rate of compensation if the roads failed to carry the mails according to schedule unless they could give a satisfactory excuse for such failure. That the Postmaster General had the power to do this has already been demonstrated.

II.

Under the Contract in Question the Appellant Agreed, in Carrying the Mails, to Maintain Its Train Schedules.

Since it is clear that the Postmaster General had power to enter into a contract with the appellant whereby the latter was bound to maintain the train schedules published by it from time to time, the only remaining question is whether he did so as a matter of fact. In view of the statutes and regulations in force at the time this contract was entered into it is obvious that this question must be answered in the affirmative.

We have just seen that prior to July 1, 1906, the Postmaster General had occasionally entered into contracts with railroads whereby they were required in special class of cases to maintain their train schedules. Whether and to what extent he should exercise his power to do so had been discretionary with him. But on that date the follow-

ing provision of the Act of June 26, 1906, went into effect:

> That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay when such delay is not caused by unavoidable accidents or conditions.

Clearly Congress intended by this act to make the exercise of the power of the Postmaster General to incorporate the train schedules into contracts for mail carriage mandatory in all cases. As was stated by the Court of Claims in its opinion in the case of *Louisville & Nashville Railway Co.* v. *United States,* followed by it in the case at bar, this statute was a mandatory direction to the Postmaster General to do what he already had the right to do.

In an opinion delivered December 3, 1908 (27 Op. 108), in which the Attorney General held that this provision and the similar one contained in the act of March 2, 1907, were applicable only to the appropriation periods covered by the acts of which they were a part, he said, page 109:

> The language employed in the first of these appropriation acts is "that the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract," while in the second it is declared "that the Post-

> master General shall require all railroads carrying the mails to maintain their regular train schedules"; the remaining words in both clauses being identical. Now, so far as the prompt arrival and departure of mails is concerned, there is no difference between requiring the railroads to keep their contracts and requiring them to maintain their regular train schedules. What the railroads contract to do is to carry the mails in accordance with the schedules fixed by them. * * *

He held, however, that the fact that these statutes were no longer in force did not affect the powers of the Postmaster General. Referring to Revised Statutes, section 3962, he said (p. 112):

> The only difference between this act and the provisions in the appropriation bills on the same subject is that under the permanent law the Postmaster General has power in his discretion to impose penalties for delays in carrying the mails, while under the temporary provisions he was required to impose such penalties.

Even if the construction put upon this statute by the appellant were correct, that it merely authorized the Postmaster General to impose fines for failure to run trains according to schedule in those cases in which the company was under contract to maintain its schedules, that would be immaterial, for, as a matter of fact, under the statutes the Postmaster General did exercise his power to incorpo-

rate the train schedules into the contract of carriage in every case by the promulgation of Order No. 1131, which provides that every railroad company operating a route over which mails are carried must report quarterly the number of minutes late of each arrival—

> of every train carrying mail which has reached the terminus of said route, the terminus of such train's run, or any intermediate point designated by the Postmaster General and of which the company shall have notice, thirty minutes or more late as many as ten times during the quarter.

The contracts under which appellant had been carrying the mails expired June 30, 1906. The statute of June 26, 1906, and Order No. 1131 were part of the terms on which the Postmaster General offered to enter into a new contract with appellant for the carriage of the mails. Both were known to the railroad company. They constituted a notification to it that it would not be entitled to the full compensation contracted for for carrying the United States mails unless it maintained its train schedules within the limits required by the order. By performing the service in accordance with these terms and accepting payment in the amount offered it, without protest against the deductions, it accepted the offer of the Postmaster General. *Minneapolis & St. Paul Railway Co.* v. *United States*, 24 Ct. Cl. 350; *Eastern Railroad Co.* v. *United States*, 129 U. S. 396. Both parties having power

to enter into a contract on these terms and having done so, there is no ground on which appellant can recover the amount of the deductions.

III.

The Deductions Were Justified Even If the Appellant Was Not Under Contract to Maintain Its Train Schedules.

The question whether the Postmaster General had power to make the deductions in question may, however, be viewed from another aspect. Under Revised Statutes, section 3962, the Postmaster General has power not merely to make deductions for failure to perform services according to contract but to impose fines upon them for "*other delinquencies*" which need not be breaches of contract.

Appellant admits that even if it was not under contract to maintain its train schedules it was liable for unreasonable delays in the arrival of its trains caused by its negligence. Such unreasonable delays, if caused by its negligence were, if not breaches of contract, at least delinquencies under Revised Statutes, section 3962. Unless the Postmaster General manifestly abuses or exceeds his power under that act to make deductions or impose fines his action is final and not subject to judicial review. (*Allman* v. *United States,* 131 U. S. 31; *Parker* v. *United States,* 26 Ct. Cl. 344). As a matter of fact no deductions were made under Order No. 1131 unless the delays were, in the judgment of the Postmaster General, caused by ap-

pellant's negligence, and that order furthermore evidenced the judgment of the Postmaster General that if a train was thirty or more minutes late ten times in one quarter, such delay was unreasonable.

The Postmaster General had power to make the deductions and it is not contended that he exercised the power arbitrarily or unreasonably. Therefore the appellant has no cause of complaint, even if it was not under a contract to maintain its train schedules.

CONCLUSION.

The only question in dispute in this case is as to the Postmaster General's power to make the deductions in question, and as that power is clear in any aspect of the case, appellant has no cause of complaint. It follows that the decree of the Court of Claims dismissing the petition was correct and should be affirmed.

Respectfully,

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